Supreme Court, U.S.
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No. 04-520

IN THE

Supreme Court of the United States

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Vladyslav Palahuta,

Petitioner

v.

John Ashcroft,
Attorney General of the United States,

Respondent.

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On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals committed very obvious and exceptional errors of fact in finding that the Petitioner did not suffer past persecution or have a well-founded fear of future persecution.

2. Whether the Court of Appeals, in ignoring evidence on the record that supported the Petitioner's asylum claim, deprived him of due process.

3. Whether the Court of Appeals, in resting its decision on clearly erroneous findings of material facts, abused its discretion.

4. Whether the Court of Appeals acted in conflict with its prior decisions and with decisions of other Circuits when it failed to review *de novo* the Petitioner's claim that the Immigration Judge deprived him of due process.

5. Whether the evidence on record compels a finding of past persecution and a well-founded fear of persecution.

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## OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit, entered on April 6, 2004, under the caption *Palahuta v. Ashcroft*, No. 03-71406 (9th Cir. 2004), is unreported. (*Infra*, Appendix 3-a).

The denial of the Petitioner's Petition for Rehearing and Suggestion for Rehearing *en banc* entered on July 19, 2004, is also unreported. (*Infra*, Appendix 1-a).

The decision of the Board of Immigration Appeals entered March 3, 2003, and the oral decision of the Immigration Judge entered on July 19, 2001, are unreported. (*Infra*, Appendix 7-a, 9-a).

## STATEMENT OF JURISDICTION

By order entered April 6, 2004, the United States Court of Appeals for the Ninth Circuit affirmed the decision of the Board of Immigration Appeals denying Petitioner's appeal of the decision of the Immigration Judge. (Appendix 3-a). A petition for rehearing was denied on July 19, 2004 (Appendix 1-a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless

> on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A), provides in pertinent part:

> The term "refugee" means * * * any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]

3. Section 242(b)(4) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b)(4), provides in pertinent part:

* * *

(A) the Court of Appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary[.]

## STATEMENT OF THE CASE

A. Statement of Facts

The facts in this case are as follows: the petitioner is a citizen and national of Ukraine. The petitioner speaks Russian, Polish, and Ukrainian. Russian is his best language, and although he speaks Ukrainian, he does so with a noticeable Russian accent. Administrative Record ("A.R.") 79, 189, 407. Beginning in 1997, he participated in several demonstrations in Kiev, which were organized to protest the ultranationalist regime of President Leonid Kuchma. A.R. 156-61, 408, 416.

At a demonstration held in Kiev on October 5, 1999, the petitioner's group used microphones to protest against the Kuchma government, to support the establishment of a more responsive democracy in Ukraine, and to oppose discrimination against non-Ukrainians. A.R. 163-65, 408-09. The police came to the demonstration and demanded that the demonstrators leave in order that they not disrupt the "official policy of the Ukrainian state." A.R. 165. After the police arrested the petitioner (beating him, resulting in a broken nose and a concussion), A.R. 165-66, 336, 339, 409, they took him to the police station, where he was given a form

which he and his fellow demonstrators were to sign, wherein they acknowledged their guilt and stated that they would never again do anything or speak against the government of Ukraine. A.R. 167-68, 409; *cf.* A.R. 95. They were then released and given summonses to return to the police station within a week. A.R. 168, 409. That same night (October 5, 1999), the Petitioner went to two clinics for medical treatment for his injuries. A.R. 169, 336, 339. The Petitioner tore up the form and the summons he was given at the police station. A.R. 173. A week later, the police came to his apartment and left another summons. A.R. 87, 173-74.

Within two weeks after his arrest, the petitioner was approached on two occasions by a man whom he believed to be an organized crime figure (based on the language that he used), who threatened to have him killed if he didn't sell his apartment for a fraction of its value. A.R. 177-79, 182-83, 185, 410-11. The petitioner viewed the man as being tied to the police because of the timing of the first encounter (two weeks after his arrest) and because the man knew things that – apart from the petitioner's closest friends -- were only known to the police: that he had previously tried and had not been able to sell his apartment (which by law had to be done through the police), and that his mother was in the United States. A.R. 177-80, 185, 410.[1] Shortly after these encounters, the police left yet another summons at his apartment, and the petitioner went into hiding. A.R. 185.

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[1] The Department of State Report discusses the connection between the government and organized crime in Ukraine. A.R. 237.

The petitioner fears further arrest by the police in Ukraine and punishment (including lengthy imprisonment) for not responding to the summonses issued to him after his arrest in October, 1999, and for his opposition to the Kuchma regime. He fears he will suffer the beatings and torture that are inflicted on other opponents of the Kuchma regime in Ukrainian prisons. He has received letters from his friends in Ukraine describing arrests of his friends and warning that the police are looking for him. He also fears that the man who threatened him has ties to the police and will have him killed. The petitioner also believes that he cannot relocate elsewhere in Ukraine outside of Kiev because of the need to register for a *propiska* (residence permit) with the police in any new city (who would then notify the police in Kiev where he is) and also because of the violence carried out against Russian-speakers in other Ukrainian cities. A.R. 188-89, 411. *See also* A.R. 237, 238-39, 242, 247; 293; 301-05; 398, 404.

B. Administrative Proceedings

The hearing on the merits of the Petitioner's application for asylum and withholding of removal took place on July 19, 2001. The Immigration Judge ("IJ") denied the petitioner's application for asylum and withholding, as well as relief under Article 3 of the Convention Against Torture, and ordered him removed to Ukraine. A.R. 69. In her oral decision (App. *infra*, at 9-a), the IJ made no reference to the petitioner's demeanor or to any evasiveness on his part. App. 9-39-a; A.R. 72-98. However, the IJ made a *partial* negative credibility finding, App. 35-a, A.R. 94, and found that the

petitioner's experiences did not rise to the level of past persecution or provide the basis for a well-founded fear of persecution in the future. App. 36 – 38-a.

However, the IJ did not consider the petitioner's testimony as to his fear of returning to Ukraine because of what has happened to other opponents of the Kuchma regime, and ignored the evidence on the record (newspaper articles, State Department reports, and letters from the petitioner's friends) that supported his claim of a well-founded fear of persecution. App. 9-39-a.

Finally, the IJ found that the petitioner's encounters with the organized-crime figure who threatened to have him killed if didn't agree to sell his apartment was not tied to a statutorily-protected ground. App. 37-38-a; A.R. 96-97.

The petitioner timely filed his Notice of Appeal with the Board of Immigration Appeals ("Board" or "BIA") on July 27, 2001. A.R. 5-32, 63-65. The Board issued its decision on March 3, 2003. A.R. 1-2. App. 7-a. The Board affirmed the decision of the IJ without undertaking an independent review.

## DECISION OF THE NINTH CIRCUIT

On April 6, 2004, the Court of Appeals for the Ninth Circuit denied Mr. Palahuta's petition. App. 3-6-a. In its decision, the Court of Appeals did not explicitly review the decision of the IJ, as is the rule.[2] The Court of Appeals summarized the

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[2] It is settled law in the Ninth Circuit and in other Circuits, that where the Board affirms the decision of the IJ without undertaking an independent analysis, the

facts of the case as follows: the petitioner was arrested and struck at a demonstration protesting the University's Ukrainian-language policy, and taken to jail; he was released the same day after being issued a summons and a form acknowledging his guilt; he fears *persecution* by the police for his failure to appear as required by the summons; and an organized-crime figure offered him 1/5 of the market price for his apartment, or death. Appendix 4a-6a. (italics added). The Court of Appeals also found that, assuming Mr. Palahuta's credibility, the Board's conclusion that his "past harassment" does not rise to the level of persecution, and that his fear of prosecution for failing to respond to the summonses likewise does not rise to that level. *Id.* Furthermore, the appellate court found that the threats made against the petitioner by the man who wanted to buy his apartment were not on account of a protected ground. *Id.* Finally, the Court of Appeals, while not addressing, considering, or discussing the petitioner's claim that the IJ's decision deprived him of due process, ruled that "Palahuta's remaining contentions lack merit." *Id.*

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appellate court is required to review the decision of the *IJ*. *See, for example*, *Gonzales v. INS*, 82 F.3d 903, 907 (9th Cir. 1996); *Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003) ("To the extent that the BIA adopted the findings of the IJ as its own, we treat the decision of the IJ as that of the BIA."); *He v. Ashcroft*, 328 F.3d 593, 595-96 (9th Cir. 2003); *Rhoa-Zamora v. INS*, 971 F.2d 26, 36 (7th Cir. 1992); *Albathani v. INS*, 318 F.3d 365, 373 (1st Cir. 2003); *Soadjede v. INS*, 324 F.3d 830, 832 (5th Cir. 2003); *Loulou v. Ashcroft*, 354 F.3d 706, 708 (8th Cir. 2003); *Belbruno v. Ashcroft*, 362 F.3d 272 (4th Cir. 2004) 2004 WL 603501 at 9; *Yuk v. Ashcroft*, 355 F.3d 1222, 1230 (10th Cir. 2004)

## REASONS FOR GRANTING THE PETITION

The Court of Appeals mischaracterized evidence and ignored evidence on the record that supported the petitioner's claim for asylum and withholding of removal. As a result, the Court of Appeals for the Ninth Circuit committed very obvious and exceptional errors of fact; deprived the petitioner of due process; and abused its discretion. In addition, the Court of Appeals erred as a matter of law, and acted in conflict with its prior decisions and those of other Circuits, in failing to review *de novo* the petitioner's claim of due process violation by the Immigration Judge.

1. The Circumstances of This Case Require that the Court Review the Factual Findings of the Court of Appeals

The Court will normally abstain from reviewing factual findings of the lower courts. There are exceptions to this rule, however. First, the Court will examine the factual record where there is a very obvious and exceptional showing of error. *Exxon v. Sofec, Inc.*, 517 U.S. 830, 841 (1996); *Berenyi v. District Director, INS*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co. v. Linde Air Product Co.*, 336 U.S. 271, 275 (1949).

Second, the Court will undertake a review of the evidence on record where review of the facts is necessary to decide a question of deprivation of a constitutional right; *see, for example*, *Berenyi*, 385 U.S. at 636 ("[t]his Court has not hesitated to undertake independent examination of factual issues

when constitutional claims may depend on their resolution"); *Napue v. Illinois*, 360 U.S. 264, 271-72 (1959); *Norris v. State of Alabama*, 294 U.S. 587, 589-90 (1935). There is "a long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest," *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954); *Payne v. Arkansas*, 356 U.S. 560, 562 (1958) ("[t]he performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both"); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1958) ("[i]n cases where there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded").

As discussed *infra*, both of these exceptional circumstances apply to the decision by the Ninth Circuit Court of Appeals. Accordingly, the Court should review the appellate court's findings of fact.

2. The Court of Appeals Committed Very Obvious and Exceptional Errors of Fact

The Court of Appeals mischaracterized the nature of the demonstration at which the petitioner was arrested and struck by the police; the injuries that he received at the hands of the police; and the motivation of the police in breaking up the demonstration. The appellate court also overlooked evidence on the record that was crucial to the petitioner's well-founded fear of persecution. These mischaracterizations and omissions constitute very obvious and exceptional errors of fact.

a. The Appellate Court Mischaracterized the Political Nature of the Demonstration at which the Petitioner Was Injured and the Political Motivation of the Police

The Court of Appeals mischaracterized the evidence on the record and ignored key items of evidence: the appellate court stated that the petitioner was "struck" at a demonstration which was organized to oppose the Ukrainian-language-only policy of the university that the petitioner attended. Appendix 5-a.

However, the appellate court ignored the number of demonstrations in which the petitioner had participated; the purpose of these demonstrations, which was to oppose the regime of Leonid Kuchma; the political motivation of the police in breaking up the demonstration held on October 5, 1999 (accusing the students of "disrupting the official policy of the Ukrainian state"); the severity of the injuries he received (broken nose and concussion, for which he required medical treatment);[3] and the warning by the police after his arrest not to undertake any further action in opposition to the Ukrainian government. A.R. 156-61, 163-65, 167-68, 336, 339.

Thus there is a significant amount of evidence on the record which the Court of Appeals failed to consider, and a considerable difference between what the record shows and the findings of the appellate court. Facts such as these "do not

[3] The petitioner's testimony and medical documents establish that the injuries occurred. A.R. 166, 169, 336, 339, 409.

cease to exist because they are ignored,"[4] and the connection drawn by the petitioner between his political opinion and activity and his injuries at the hands of the police has "the unmistakability of a dinosaur in a haystack." *See Borja v. INS*, 175 F.3d 732, 737 (9th Cir. 1999) (*en banc*). The Court of Appeals ignored the evidence that established that the petitioner suffered past persecution. 8 U.S.C. § 1101(a)(42)(A).[5] Thus, there are very obvious and exceptional errors in the Court of Appeals' findings regarding past persecution.

b. The Appellate Court Mischaracterized Evidence and Failed to Consider Other Material Evidence Regarding the Petitioner's Fear of Returning to Ukraine

The petitioner testified that he was afraid of returning to Ukraine because he feared sharing a similar fate as other dissenters from the Kuchma-regime (long imprisonments, beatings, and torture); many of his friends have been arrested; the police are still looking for him; and that the organized-crime figure was tied to the police and would have him killed. A.R. 180, 188-90, 215.

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[4] *Falcon-Carriche v. Ashcroft*, 350 F.3d 845, 857 (9th Cir. 2003) (Nelson, C.J., concurring in part and dissenting in part).

[5] The Ninth Circuit has consistently held that physical harm tied to a protected ground constitutes persecution. *See, for example, Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (*en banc*); *Korablina v. INS*, 158 F.3d 1038, 1045 (9th Cir. 1998); *Navas v. INS*, 217 F.3d 646, 656 (9th Cir. 2000); *Duarte de Guignac v. INS*, 179 F.3d 1156, 1161 (9th Cir. 1999); *Chand v. INS*, 222 F.3d 1066, 1073 (9th Cir. 2000).

The record contains significant documentation regarding the systematic mistreatment of those similarly situated to the petitioner, *i.e.*, dissenters and dissidents in Ukraine. A.R. 238-39, 240, 243, 293, 301-02, 304-05, 398.[6] The Court of Appeals failed even to discuss this evidence. App. 4a-6a. However, the appellate court's overlooking of the persecution of those similarly situated to the petitioner and of the petitioner's fear of sharing their fate led it to a mischaracterization of the petitioner's fear of returning to Ukraine.[7]

Furthermore, the appellate court ignored evidence regarding the connection between his encounters with the organized-crime figure and the police, specifically: the timing of these encounters (shortly after his arrest); the information about the petitioner that the man possessed that was known almost exclusively by the police (that he had earlier tried and was not able to put his apartment up for sale because he couldn't obtain the necessary documents from the police, and that his mother was

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[6] For example, the State Department Report for Ukraine for 2000 discusses the arbitrary arrests and detentions of dissenters, government ties to organized crime, and the use of violence by the police and militia against politically active individuals opposed to the Kuchma-regime. A.R. 237-39, 240, 243.

[7] In likening this case to *Abedini v. INS*, 971 F.2d 188 (9th Cir. 1992), the Court of Appeals ignored that the petitioner fears arrest, imprisonment, and possible torture in Ukraine on account of his opposition to the Kuchma-regime. In *Abedini*, the petitioner feared potential prosecution for distributing western films and videos, an offense that the Ninth Circuit found was not tied to any protected ground.

in the United States); and the connection between organized crime and the government in Ukraine. A.R. 179-80, 237, 410. [8]

Although a court "may not simply ignore record evidence that favors the applicant's case," *see Diallo v. Ashcroft*, --- F.3d ---, 2004 WL 1900385 (7th Cir. August 26, 2004), at 5, the Court of Appeals nonetheless ignored direct and substantial evidence in the record that establishes the elements of a well-founded fear of persecution. Accordingly, the Court of Appeals committed very obvious and exceptional errors of fact.

3. The Court of Appeals' Decision Deprived the Petitioner of Due Process

The second scenario under which the Court will examine the factual findings of the appellate court is where a constitutional issue has been raised and an examination of the facts is necessary in order to determine whether a petitioner has been deprived of a constitutional right. *Berenyi,* 385 U.S. at 636; *Napue*, 360 U.S. at 271-72; *Norris,* 294 U.S. at 589-90; *Kern-Limerick*, 347 U.S. at 121; *Payne*, 356 U.S. at 562; *Niemotko*, 340 U.S. at 271.

In this case, the petitioner was denied due process insofar as a full and fair hearing was denied to him: the Court of Appeals erred in failing to consider evidence on the record that supported his

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[8] The Court of Appeals also did not consider the State Department Report, which states that "the pervasiveness of corruption, connections between government officials and organized crime, and the political activities of organized crime figures often blurred the distinction between political and criminal acts." A.R. 237. *See also* A.R. 215.

claim for asylum; this error was prejudicial; and consideration of all the evidence on the record would have affected the outcome of the case.

It is long settled that aliens in deportation proceedings are entitled by the Fifth Amendment to the Constitution to due process of law. *Demore v. Hyung Joon Kim*, 538 U.S. 510 (2003); *Reno v. Flores*, 507 U.S. 292, 306 (1993). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976), *citing Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

As the "traditional standards of fairness encompassed in due process" must be adhered to in deportation proceedings, *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953), the role of the judiciary is to determine whether the procedures in question meet the essential standard of fairness under the Due Process clause of the Constitution. *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982). Being heard "in a meaningful manner" requires that the whole record be examined and that evidence on the record that supports a petitioner's claim be considered. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971); *Heckler v. Campbell*, 461 U.S. 458, 473 (1983) (Brennan, J. conc.).

A petitioner will have shown a violation of a Constitutional right such as due process by a plausible showing that evidence not considered would have been material and favorable to his case. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982), *citing Washington v. Texas*, 388 U.S. 14, 16 (1967). Implicit in the requirement of materiality is a concern that the evidence not

considered "might have affected the outcome." *See Valenzuela-Bernal*, 458 U.S. at 868, *citing United States v. Agurs*, 427 U.S. 97, 104 (1976). The errors by the lower courts claimed to deprive someone of due process must be of such a type as to prevent a fair hearing or review. *See Valenzuela-Bernal*, 458 U.S. at 872.

In the instant case, the Court of Appeals ignored evidence on the record that established that the petitioner suffered severe physical harm at the hands of the police as a result of the petitioner's participation in a political demonstration protesting the ruling regime that was broken up by the police because the petitioner and others were "disrupting the policy of the Ukrainian state." He was also warned not to engage in any further act of opposition to the government of Ukraine. *See* pp. 10-11 *supra*. This evidence established the elements of past persecution.

The Court of Appeals also failed to consider: the petitioner's testimony that he feared sharing the fate of those similarly situated to him as opponents of the Kuchma-regime; the State Department Report describing the imprisonment and torture meted out to the opponents of the Kuchma-regime; the newspaper articles in the record that described the harsh treatment of dissenters in Ukraine; the letters from the petitioner's friends in Ukraine describing how the police were still very interested in him and that he should stay away; and his fear of relocating within Ukraine because of the violence directed at people who, like him, are native Russian-speakers. *See* pp. 11-13 *supra*. Thus the Court of Appeals ignored evidence that established the elements of a well-founded fear of persecution.

These actions by the Court of Appeals severely prejudiced the petitioner. The evidence ignored by the Court of Appeals was material to the petitioner's showing of past persecution and his well-founded fear of future persecution. Nothing on the record supports or explains the Court of Appeals' disregard of all the evidence that directly contradicts its decision. *Cf. Vujisic v. INS*, 224 F.3d 578, 582 (7th Cir. 2000).

Accordingly, the evidence not considered by the Court of Appeals would have been both material and favorable to the petitioner and, had it been considered, would have effected its outcome. *See Valenzuela-Bernal*, 458 U.S. at 867-68. Thus, the failure of the Court of Appeals to consider this evidence constitutes a denial of the petitioner's right to due process.

4. The Decision of the Court of Appeals Constituted Abuse of Judicial Discretion

The failure of the Court of Appeals to consider the entire record of the case also constituted an abuse of discretion. The Court "from time to time is compelled to hold that a federal court has abused some discretionary judicial power. Abuse of judicial discretion is a technical phrase to express a misconception of the judicial function as exercised in a particular situation." *McBride v. Toledo Terminal Rail Co.*, 354 U.S. 517, 519-20 (1957). The Court has found that a lower court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx*, 496 U.S. 384, 405

(1990); *see also U.S. v. Rahm*, 993 F.2d 1405, 1410 (9th Cir. 1993).

As discussed *supra*, the Court of Appeals mischaracterized the evidence in this case, and ignored other evidence that established the elements of past persecution and of a well-founded fear of future persecution. The appellate court failed to consider all the evidence, and based its ruling "on a clearly erroneous assessment of the evidence." Thus the Court of Appeals abused its discretion.

5. The Court of Appeals' Decision Conflicts with Prior Decisions of the Ninth Circuit and of Other Circuits Regarding Review of Due Process Claims

The decision of the Court of Appeals is in direct conflict with other Circuits, and is at odds with its own prior decisions regarding the review of a petitioner's claim of violation of due process by either an IJ or the Board of Immigration Appeals. Due process claims in the Ninth Circuit and other Circuits are reviewed by the Court *de novo*. *Khup v. Ashcroft*, 376 F.3d 898, 902 (9th Cir. 2004); *Monjaraz-Munoz v. INS*, 327 F.3d 892, 895 (9th Cir. 2003); *Jacinto v. INS*, 208 F.3d 725, 727 (9th Cir. 2000); *Hartooni v. INS*, 21 F.3d 336, 339 (9th Cir. 1994); *Romilus v. Ashcroft*, --- F.3d ---, 2004 WL 2059565 (1st Cir. September 14, 2004), at 3; *De Zavala v. Ashcroft*, --- F.3d ---, 2004 WL 2094929 (5th Cir. September 21, 2004), at 3; *Hasanaj v. Ashcroft*, --- F.3d ---, 2004 WL 2151282 (7th Cir. September 27, 2004) at 3; *Kuschchak v. Ashcroft*, 366 F.3d 597, 602 (7th Cir. 2004); *Abdulrahman v. Ashcroft*, 330 F.3d 587, 595-96 (3rd Cir. 2003); *Belbruno v. Ashcroft*, 362 F.3d 272, 278 (4th Cir. 2004).

The petitioner in this case argued in its briefs to the Court of Appeals that the Immigration Judge deprived him of due process by ignoring evidence on the record that supported his application for asylum, and that this action was prejudicial to the petitioner. The Court of Appeals was required to review this particular claim *de novo*. However, the appellate court failed to do so.

The Court of Appeals did not discuss the petitioner's due process claim at all. App. 3-6a. Thus the decision of the appellate court conflicts with the other Circuits, and is at odds with its own prior decisions.

6. Evidence on the Record Compels the Conclusion that the Petitioner is Eligible for Asylum and Withholding of Removal

Given the facts of this case, a reasonable factfinder would have to conclude that the requisite fear of persecution existed. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); 8 U.S.C. § 1252(b)(4)(B). The reasonable fact-finder would have considered the evidence described *supra* in §§ 2a and 2b (pp. 10-13) and found the petitioner established both past persecution and a well-founded fear of future persecution.

The petitioner's broken nose and concussion rise to the level of "physical harm;" the police attacked the petitioner and his fellow demonstrators who were demonstrating in opposition to the regime of Leonid Kuchma; the grounds given by the police were that the demonstrators were "disrupt[ing] the official policy of the Ukrainian state;" and, after arresting several of them, directed them to sign statements admitting that they had attempted to

destroy the political structure of Ukraine. A.R. 165, 168, 409. Thus, the petitioner suffered physical harm "on account" of the statutory ground of political opinion. This was on account of both the petitioner's actual political opinion (opposition to the Kuchma-regime) and the political opinion imputed to the petitioner by the police (attempting to destroy the political structure of Ukraine).[9]

With regard to the petitioner's well-founded fear of future persecution, a reasonable finder of fact would have considered the evidence that the IJ and the Court of Appeals ignored: the letters from the petitioner's friends; the newspaper articles; and the State Department Report that discusses the government's pursuit and mistreatment of political opponents and dissenters. A.R. 215, 237-39, 240, 243-44, 245-46, 301-02, 304-05, 398, 404, 411. These establish that the petitioner has a well-founded fear of persecution on account of political opinion.

In addition, a reasonable finder of fact would have considered the evidence describing the threat of violence against Russian-speakers in other parts of Ukraine outside of Kiev, and the petitioner's fear of relocating elsewhere in Ukraine because he would be recognized as a native Russian-speaker on account of his strong Russian

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[9]The doctrine of imputed political opinion focuses on a persecutor's perception of the applicant's beliefs, rather than the actual opinions of the applicant. *Sangha v. INS*, 103 F.3d 1842, 1849 (9th Cir. 1997). An imputed opinion is one that the applicant is believed to harbor, even if he does not. *Mejia v. INS*, 298 F.3d 873, 878 (9th Cir. 2002).

accent. A.R. 79, 188-89, 319-26, 342, 347, 351, 367-68, 407, 411-12.

Finally, a reasonable trier of fact would have considered the evidence regarding the petitioner's encounter with the man who threatened him and found that the threat from that man was tied to the petitioner's political opinion and connected to his troubles with the police. The petitioner's task was not to establish the *exact* motivation of the man who accosted him, but "to demonstrate the reasonableness of a motivation which is tied to one of the enumerated grounds." *Matter of S-P-*, 21 I & N Dec. 486, 495 (BIA 1996). *Direct* proof of a persecutor's motive is not required of an applicant for asylum. *INS v. Elias-Zacarias*, 502 U.S. at 483. An applicant for asylum needs only to produce evidence to show that the threat is motivated, at least in part, by an actual or implied protected ground. *Shoafera v. INS*, 228 F.3d 1070, 1075 (9th Cir. 2000). Where an economic motive involves a political element, that political element can expose an applicant to serious consequences. *Borja v. INS*, 175 F.3d at 736.

The evidence on the record points to the nexus between the petitioner's encounter with the man who threatened him and his political opinion: the petitioner had never been approached about his apartment until after his arrest in October, 1999, and the organized-crime figure promised to obtain the documents necessary to sell the apartment which could only be procured through the police. A.R. 88, 178-80, 410.

People who issue such threats as in this case cannot be presumed to "have been given adequate notice that our government expects them to sign their names and reveal their individual identities

when they deliver threatening messages." *See Aguilera-Cota v. INS*, 914 F.2d 1375, 1380 (9th Cir. 1990). That the petitioner felt threatened by someone with a connection to the police points to a political motivation for the threats and intimidation aimed at the petitioner, even if it was combined with a criminal attempt at extortion. *See Navas*, 217 F.3d at 660; *cf.* A.R. 237. Furthermore, the Department of State Report for 2000 points out the connections between government officials and organized crime, stating that "the pervasiveness of corruption, connections between government officials and organized crime, and the political activities of organized crime figures often blurred the distinction between political and criminal acts." A.R. 237. Therefore, a nexus existed between the threat from the organized-crime figure and the petitioner's political opinion.

Accordingly, under the "substantial evidence" standard, a reasonable trier of fact, considering all the evidence in the record, would have to find that the Petitioner experienced past persecution; has a well-founded fear of future persecution; and that it is more likely than not that the Petitioner faces persecution if he returned to Ukraine.

## CONCLUSION

This case raises questions of due process and abuse of judicial discretion. Justice Robert H. Jackson wrote that "[p]rocedural fairness and regularity is the indispensable essence of liberty." *Shaughnessy*, 345 U.S. at 224 (Jackson, J., diss.). The Court of Appeals applied neither fairness nor

regularity to this case. Accordingly, the petitioner respectfully requests that this Court grant *certiorari*.

Respectfully submitted,

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*Attorney for Petitioner*

# APPENDIX

APPENDIX A

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**
Denial by Court of Appeals of Petition for Rehearing
July 19, 2004

FILED
July 19 2004
Cathy A. Catterson, Clerk
U.S. Court of Appeals

| | |
|---|---|
| VLADYSLAV PALAHUTA, | ) No. 03-71406 |
| Petitioner, | ) Agency No. A78-759-390 |
| v. | ) |
| JOHN ASHCROFT, Attorney General, | ) ORDER |
| Respondent | ) |

Before: THOMAS, W. FLETCHER, and BEA, Circuit Judges.

Vladyslav Palahuta's petition for panel rehearing is denied.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

No further filings shall be accepted in this closed appeal.

APPENDIX B

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**
Denial of Petition for Review
April 6, 2004

NOT FOR PUBLICATION

FILED
APR – 6 2004
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

| | | |
|---|---|---|
| VLADYSLAV PALAHUTA, | ) | |
| | ) | No. 03-71406 |
| Petitioner, | ) | |
| | ) | Agency No. |
| v. | ) | A78-759-390 |
| | ) | |
| JOHN ASHCROFT, | ) | |
| | ) | |
| Attorney General, | ) | MEMORANDUM* |
| | ) | |
| Respondent. | ) | |
| | ) | |

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted April 1, 2004**

BEFORE: THOMAS, W. FLETCHER, and BEA, Circuit Judges.

Vladyslav Palahuta, a native and citizen of Ukraine, petitions for review of the Board of Immigration Appeals' ("BIA") dismissal of his appeal of the Immigration Judge's denial of his application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). We have jurisdiction pursuant to 8 U.S.C. § 1252(a). We review for substantial evidence, *INS v. Elias-Zacarias*, 502 U.S. 478, 484 (1992), and we deny the petition for review.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Palahuta was arrested and struck at a demonstration protesting the university's Ukrainian-language only policy, and taken to jail. He was released the same day after being issued a summons and an application form acknowledging his guilt. He fears persecution by the police for his failure to appear as required by the summons. Palahuta also testified that shortly after his arrest, a mafioso offered him 1/5 of the market price for his flat, or death.

Assuming Palahuta testified credibly, substantial evidence supports the BIA's conclusion that this past harassment does not rise to the level of persecution. *See Nagoulko v. INS*, 333 F.3d 1012, 1016 (9th Cir. 2003) (persecution is "an extreme concept that does not include every sort of treatment our society regards as offensive.")

Substantial evidence also supports the BIA's conclusion that Palahuta failed to establish that he has a well-founded fear of future persecution because Palahuta's fear of prosecution by the police for his failure to respond to the summonses does not constitute persecution, *see Abedini v. INS*, 971 F.2s 188, 191 (9th Cir. 1992), and because the mafioso's low offer on his flat and threat to kill him if he did not sell him the flat were not on account of an enumerated ground, *see Sangha v. INS*, 103 F.3d 1482, 1489-90 (9th Cir. 1997).

Because Palahuta failed to establish eligibility for asylum, it follows that he failed to satisfy the more stringent standard for withholding of removal. *See Marcu v. INS*, 147 F.3d 1078, 1083 (9th Cir. 1998).

Palahuta is not entitled to relief under the CAT because he did not demonstrate that it was more likely than not that he would be tortured if returned to the Ukraine. *See Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir. 2001).

Palahuta's remaining contentions also lack merit.

PETITION FOR REVIEW DENIED.

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

Denial of Appeal of Oral Decision of the Immigration Judge
March 3, 2003

File: A78-759-390 – Los Angeles

Date: March 3, 2003

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Reisman, Edward S., Esq.

ORDER:

PER CURIAM: We affirm the decision of the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those of the Immigration Judge articulated in his or her decision"). The respondent

has failed to satisfy his burden of proof in these proceedings. The Immigration Judge correctly noted weaknesses in the respondent's credibility and documentation. However, we find that, even if credible, the respondent has not set forth sufficient facts as to demonstrate that his past experiences rise to the level of persecution or torture or that they occurred on the basis of any of the statutory bases for asylum. We further find that the respondent has not shown that he has a well-founded fear of persecution in Ukraine or that there is sufficient probability of persecution or torture as to warrant a grant of withholding or deferral of removal. Accordingly, the appeal is dismissed.

s/
(ROGER PAULEY)
FOR THE BOARD

APPENDIX D

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**IMMIGRATION COURT**
Los Angeles, California
Oral Decision of the Immigration Judge
Denying Asylum and Withholding
Of Removal
July 19, 2001

File No.: A 78 759 390

In the Matter of )
)
VLADYSLAV PALAHUTA )
)
Respondent )

IN REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT:
Edward S. Reisman,
Attorney at Law
501 Santa Monica Blvd., Ste. 610
Santa Monica, California 90401

ON BEHALF OF SERVICE:
Jo Ann Platel,
Asst. District Counsel
Los Angeles, California

ORAL DECISION OF THE IMMIGRATION JUDGE

Statement of Fact and Procedure

The respondent is a 33-year-old single male native and citizen of Ukraine.

The Immigration and Naturalization Service (hereafter Service) issued a Notice to Appear (hereafter NTA) dated October 26, 2000 in the name of respondent. The NTA is marked as Exhibit 1. In the NTA, the Service alleges that respondent is removable on the charges set forth above.

During proceedings held on March 21, 2001, the respondent appeared before an Immigration Judge with representation by counsel. Through counsel, respondent admitted the truth of each of the factual allegations in the NTA supporting the grounds of inadmissibility and was found to be removable based upon

respondent's admissions. Section 240 Immigration and Nationality Act (hereafter INA).

Respondent's initial asylum application was filed with the Court on June 8, 2001 and is marked as Exhibit 2. Respondent has also submitted his multi-page declaration marked as Exhibit 3 and supporting documents marked as Exhibits 4, 5, 6, 7 and 8. The Service has offered Exhibit 9, the United; States Department of State Country Reports on Human Rights Practices for the country of Ukraine, year 2000, and Exhibit 10, the Ukraine Profile of Asylum Claims and Country Conditions, a publication also of the United States Department of State of State dated June 1997.

The asylum application will be considered as well as a request for withholding of removal under Section 241(b)(3) INA. The relief of Article III of the Convention Against Torture will be considered as well. The respondent has requested benefit of voluntary departure under Section 240B INA. Unfortunately, respondent is ineligible for this form of relief at the conclusion of proceedings. Under Section 240B(b)(1)(A), the respondent must show that he has been physically present in the United States for a period of at least one year immediately preceding

the date the Notice to Appear was served upon respondent under Section 239(a) INA.

Statutory Requirements for Asylum and Withholding of Removal

To establish eligibility for asylum under Section 208 INA, an alien must meet the definition of a refugee under Section 101(a)(42)(A) INA by showing that he is unable or unwilling to return to a country because he has suffered persecution or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. Either past persecution or a well-founded fear of future persecution provide eligibility for a discretionary grant of asylum. Lopez-Galarza v. INS, 99 F.3d 954 (9th Cir. 1996).

Persecution, although not defined in the statute, has been described in case law as "punishment or harm suffered because of political, religious, racial or other reasons in a way regarded as offensive." Fisher v. INS, 79 F.3d, 955 (9th Cir. 199 ).

To establish a well-founded fear of persecution requires subjectively genuine and objectively reasonable fear of persecution on

account of one of the five groups mentioned in Section 101(a)(42)(A) INA. The subjective component requires that the applicant have a genuine concern that he will be persecuted and may be satisfied by the applicant's testimony that he genuinely fears persecution. The objective component requires that the alien establish a reasonable fear of persecution by credible, direct and specific evidence.

Additionally, pursuant to withholding of removal Section 241(b)(3) INA, an alien will not be returned to a country where his life or freedom would be threatened on account of on of the five groups mentioned previously. The standard showing that it is more likely than not that an alien would be imprisoned or killed is higher than that required for asylum. INS v. Stevic, 467 U.S. 407 (1984).

Article III Convention Against Torture

The respondent is seeking relief and is asking for withholding of removal under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), supra. Torture is defined as any act by which severe pain. or suffering, whether physical or mental, is intentionally inflicted on a person. See 8 C.F.R.

Section 208.18 (a) (1). Further the pain or suffering must be inflicted or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. 8 C.F.R. Section 208.18(a)(1). Lawful sanctions do not include sanctions that defeat the object and purpose of the Torture Convention.

The applicant for withholding of removal under the Torture Convention bears the burden of proving that it is more likely an of that he would be tortured if removed to the proposed country of removal. As with asylum, the burden can be established by testimony without corroboration if that testimony is credible. Matter of Y-B-, Int. Dec. 3337 (BIA 1998). In assessing whether the applicant has satisfied the burden of proof, the Court must consider all evidence relevant to the possibility of future torture including evidence of past torture inflicted upon the applicant, evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured, evidence of gross, flagrant or mass violations of human rights within the country of removal or other relevant information of conditions in the country of removal.

In any application for relief under each of these sections, the burden of proof of eligibility for relief is upon the alien. As asylum is a

discretionary form of relief, the burden of proof is upon the alien to show that he merits the relief requested.

Testimony of Witness and Analysis

Following is the testimony of the only witness to appear in this proceeding, the respondent, and an analysis of that testimony.

Before presentation of the actual claim supported by the application, declaration and documentation, the respondent, through testimony, authenticated two documents to which the Service placed objections. These documents are as follows. Exhibit 6(35), a birth certificate, and Exhibit 6(36) an internal tortured. The documents were initially marked for identification only, but after authentication the documents were marked and admitted into evidence.

In brief, as to respondent's birth certificate, the respondent received his birth certificate when he asked a friend in the Ukraine to send it to the respondent. The respondent testified that he left all of his documents with a friend and requested the birth certificate in November or December of the year 2000 when respondent began discussing issues wit his attorney in the United States. The respondent was living in the United States at that

time. The document apparently is a duplicate original. The Service raised an issue of the appearance of the document and the respondent agreed that the document did not look old, that the document generally was in good condition. Respondent first saw the birth certificate document when he received his high school diploma in about 1984. The Service noted that although the document shows that respondent's mother is of Polish origin, that there is no other evidence in the record to sustain this fact. The Service raised the issue as one part of respondent's claim has to do with his ethnicity. The document itself was described by the Berlitz Russian interpreter as a document in Russian and in a non-Russian language. The respondent testified that he did not take the birth certificate with him on coming to the United States because he feared harm at the Ukraine airport, although he had appropriate documents to leave the Ukraine, including a visa for Mexico.

As to the document, the internal passport, the respondent testified that that document was issued July 28, 2000 in the management office of the house where the respondent lived. The document is normally collected at the police station. Respondent feared going to the police station and arranged through friends to receive the passport in the management office of his

residence. The passport is with respondent all of the time since its issuance.

Respondent testified that before he received the internal passport he had a USSR Soviet passport and that he received he internal passport when the government ordered the issuance of the Ukrainian passport. It was a mandatory order on the part of the government. The Soviet passport is in the Ukraine with respondent's friend. The internal passport was issued by the ministry of internal affairs, an agency of the police and apparently approved by the police. For those individuals who did not come to the station to retrieve the internal passport, the passports were sent to these individual's residence according to the respondent. This concludes the testimony concerning the authentication of the two documents.

Beginning the presentation of his claim, respondent testified hat he was born in the city of Kiev on August 2, 1967. Respondent testified as to the name of his mother, Sofia Ivanovna Palahuta. Respondent's mother is currently living in the United States. She was granted asylum, according o testimony, in 1996 and became a permanent resident in the year 2001. The Service raised an issue at this point concerning the

presentation of respondent's mother's name as it appears in the form I-589, Exhibit 2, showing the name Burinskaya instead of the name Ivanovna. The respondent testified that Burinskaya is his mother's maiden name, the full name being Sofia Burinskaya Palahuta. Respondent's explanation for the name Burinskaya appearing in the application instead of the name Ivanovna was that respondent thought that the maiden name was required in the section of the form I-589 asking for information about the respondent's family. The respondent testified that his application for asylum filed with the Court June 8, 2001 was prepared by his attorney and translated for the respondent by his attorney, that respondent was fully aware of the statement in the application and his declaration and that they are correct. As to respondent's father, respondent's father has been unknown to him since early childhood.

Respondent speaks three languages; Russian, Polish and Ukrainian. He indicates that at this time his best language is Russian. He spoke Polish as a child and he speaks Ukrainian, but with a noticeable accent. He also commented that his name Vladyslav has an origin as a Polish name and that as a child the respondent lived in Lithuania with a grandparent or grandparents, but that he was schooled in Kiev. Respondent

finished school, apparently lower school, in 1984 and then went to vocational school until he was drafted and served in the army from 1986 until 1988. Respondent then testified hat he went to the trade economic institute and, as the testimony will show, respondent testified that although he received his diploma in 1999 that during a period he lived in Warsaw, Poland with his aunt. He was there for five years between 1991 and 1996. Respondent made trips back to Kiev during that time. This material is somewhat an issue as the form I-59 shows that respondent went to a trade and economic institute from 1989 August until 1999 June. Respondent testified that he attended the trade economic institute from 1989 until 1991 and studied in the Russian language. He then testified that problems in the Ukraine started for him when the new Ukrainian state formed on dissolution of the USSR in about 1991. Students were ordered to change to the Ukrainian language. The respondent did not know the Ukrainian language and could not continue school. The dean met with the students and told them that they must speak Ukrainian or continue their education in Russia apparently for non-Ukrainian but Russian speakers. The respondent left the institute and could not find work because here again documents were processed in Ukrainian. The respondent did not go to Russia because his propiska was from the

Ukraine and respondent would not be able to work in Russia. The respondent went to Warsaw, Poland. His relatives provided shelter and work. Respondent applied to be a permanent resident in Poland, but was rejected. Respondent testified that he traveled to Kiev constantly to check his flat. Respondent left Poland in 1996 to complete his education and live in the Ukraine. While in Kiev, he learned the Ukrainian language on the streets and on TV. Although it may not be of great importance, the Court wonders why in 1991 the respondent simply didn't learn the Ukrainian language while in Kiev on the streets and on the television when it was declared the national language and remain in Kiev to complete his education.

Issues arise concerning the dates that respondent was in the Ukraine at school or in Poland. The form I-589, part C, question 1, indicates that respondent was expelled from the vocational institute school in 1992, although respondent testified that he originally left Kiev to go to Poland in 1991. Respondent's explanation was that he returned to Kiev in 1992 and wanted to be educated, but did not really explain that he was expelled from school. He did not discuss that in direct examination, only that in 1991 the dean spoke to the students, told them that they must speak in the Ukrainian language and the

respondent left school. It seems that he left of his own accord. Also, as mentioned, question 28 of the form I-598 shows that respondent lived only in Kiev from 1989 until 2000. Question 27 indicates that respondent attended the university of trade and economics from 1989 to 1999, while respondent testified that he was in Poland from 1991 to 1996. Respondent generally explained that he thought he had to provide an address where he had his propiska and that is why in the form I-589 he has indicated in question 28 the address listed there, Kiev, Ukraine, from 1981 to 2000. It does not appear that the question indicates that to be so. The question is, "Provide the following information about your residences during the last five years. List your present address first," and the respondent has presented his residences from 1981 to the present. Respondent, on redirect, testified that when he made his return trips to Kiev, he lived at the address stated in question 28. There was no indication that these return trips were of any particular length so that one would expect the permanent address to be shown as that address and an address in Poland is not provided at all in the form I-589 where respondent asserted he lived for five years during the period covered by the answers in question 28. Respondent does not have his passport with stamps showing all

of a countries that he visited and might have lived.

Respondent then testified that he worked as a taxi driver from 1997 until 1999. His application indicates that he worked as a taxi driver from April 1990 until September 2000. The respondent indicates that that is incorrect, that he began working as a taxi driver in 1997.

Respondent, on his return to the Ukraine, was admitted to the institute, now the university of trade of economics and received a diploma in 1999. He indicates that he enrolled in 1997. Exhibit 4, tab-1, the respondent's student record, shows that the respondent was in attendance at the Kiev Institute of Trade and Economy studying eight courses, three of those courses were either begun or completed in June or August of 1991. The remainder for which a date is given were passed in February of 1997. The respondent did not offer an explanation as to why the document does not show course attendance in the year 1998 and 1999. Respondent asserts that he received a diploma from the institute in 1999, but he does not have the documents such as a diploma.

The respondent testified that in the spring of 1997 at the university the respondent

participated in a group, a group that did not have an official name but considered themselves to be socialists. The group had some 20 members with goals to protect Russian-speaking persons and to prevent anti-nationalism or dominance of the Ukrainians. Meetings and demonstrations were held by this group. The respondent, as part of his work for the group, recruited people to participate in demonstrations and initiated meetings and rallies. In the respondent's declaration he indicates that he participated in many demonstrations in Kiev which were protesting the ultra-nationalist government of President Leonid Kuchma and that he participated in a few demonstrations at the university of students and professors opposed to the Kuchma government and to the reelection of Kuchma. He does not indicate in the declaration that he was part of a formal group of 20 members with a particular goal, only that he participated with students and professors in various demonstrations, nor does he indicate the duties with the organization to which he testified. Respondent was asked whether he, was a leader in this organization. He testified that all group members were equal and united, but that he could be called a leader, although he was modest about that title. He testified that he was in 15 demonstrations. Again his declaration does not stage any particular number of demonstrations,

although it does mention that he participated in many demonstrations. Respondent testified that the first demonstration in which he appeared was held on October 1 or October 2 of 1999 in the center of the city near parliament. He also testified that in October of 1999 President Kuchma was reelected and the respondent's group spoke against reelection because no steps toward democracy in the past has been taken and because of the nationalistic attitude of the president. Students and teachers, including respondent's group, met with the deacon of the university. The authorities were unhappy about the attitude of these people apparently and the deacon told the group that if they opposed the policies, they would have trouble.

The second demonstration occurred on October 5, 1999. The group in the demonstration used microphones and said the same things as they had said in the first demonstration, that the president prohibited the Russian language on television and newspapers and in the press in general and supported the closure of Russian language schools. The police came to the demonstration and demanded that the crowd disperse and not act against the president's policy. The demonstrators, at least those in respondent's group, did not leave. They continued to use their microphones and people continued to

speak against the president. The respondent did not testify that he was a speaker. The police then used force apparently to disperse the group and the respondent was injured as part of that process. The respondent and about 11 other students were taken to the police station. They were put in cells without medical attention. The respondent was suffering from headache, bleeding and was in some pain. The students each were called for interrogation. They were each given summons to return to the police station one week later. They were also given a pre-prepared form, a type of application acknowledging guilt and promising not to oppose the government. The text was already in the form. The students were told to sign the form and threatened that if they did not sign, they would be guilty of participating in a demonstration and opposing the government policies. The respondent in his declaration references the second demonstration, the arrest and that he was taken to the police station and ultimately asked to sign a form admitting guilt. The respondent was released the same day as he was arrested, October 5. When respondent and his student friends left the police station, they tore up the papers, apparently the summons and the application, and did not return to the station. The respondent testified that he feared force on the part of the police if he returned to the station

and that he might become a defendant in a criminal case.

The respondent then testified concerning medical examination, diagnosis and-treatment that he received. Respondent testified that he went to two separate places, first to a friend for medical aid at a dental clinic at the medical institute. There is a medical document from the Stomatoligical Policlinic. That document indicates that the respondent came to the policlinic with a diagnosis of traumatic fracture of the nose bones, hematomas in the infraorbital and frontal teas, apparently around his eyes, and both nasal passages were bleeding. Also, a concussion of the brain. Roentgenography was performed (X-rays) and there was antiseptic treatment. The other document is from the department of public health, Clinical Hospital Nr. 23, Maxillary Facial Injury Unit. The respondent testified that after visiting the dental clinic, that he was referred to the hospital of facial surgery where X-rays were done and then he was referred to a local clinic. These documents support the respondent's testimony, however, it is interesting that in respondent's declaration, which was filed at the time of his application, respondent makes no statement whatsoever of any treatment for injuries. He indicates that he suffered a broken nose and received a concussion. It would appear

that the recitation of injury in the declaration is an important factor in that a portion of showing past persecution is that the individual has been harmed and one way of showing harm of course is by describing it as a statement of what happened. The respondent does not go beyond the statement that he had a broken nose and concussion. He does not describe his treatment following release from jail, only that he received the documents at the police station, left and after that respondent went back to the university and received documents telling him that he was suspended and his graduate work application was rejected.

Respondent then provided a lengthy discussion of a summons received for him from the police and of this meeting with an individual whom he believed to be a member of the mafia. Respondent testified as follows. About one week after release, respondent received a summons stating that on a certain day one week later he must return to the police station. Almost everyone in his group received a summons, these were the students arrested with him, and the summons indicated that if the respondent did not report and bring the application signed, the police would use force. Respondent does mention the summons in his declaration. Respondent indicates that he heard a knock on the door and the summons was left in the door. Respondent

did not open the door. He remained quiet. Respondent testified when asked how he knew that the police were knocking on his door that he heard the Ukrainian language and the respondent was told by neighbors. Apparently the statements by neighbors must have been made later so the respondent's testimony is that he recognized the police by the Ukrainian language. The respondent's declaration indicates that after he received a summons from the police, the summons ordering him to appear at the police station in two weeks, whereas he testified that he was to appear on a certain day one week later.

Respondent then told about his problems with the mafia. The respondent was approached on the street by a man who heard that respondent wanted to sell his flat and had problems with documents in the police station. Respondent testified that he first wanted to sell his flat in 1998. This event took place in mid-October of 1999, although the declaration states that it was November 1999. On redirect the respondent testified that the true date was sometime in October 1999. The mafia person offered the respondent $4,000 for the flat, a small portion the real price, perhaps 20 percent. The respondent was asked how the mafia person knew the respondent. Initially, the respondent answered that the mafia person knew

respondent had a problem in the police station and with the flat which the Court considers an unresponsive answer. It does not explain how the mafia person came to know the respondent, who he was and approached him because of that.

The respondent refused the offer of the mafia and was threatened by the mafia individual saying that he would be found if he refused the offer. The respondent then was living with friends in Kiev in another part of the city. However, respondent did return to his flat on occasion. Respondent was then asked how he knew that the mafia individual was mafioso. The respondent testified because he was using a certain type of slang which the respondent had heard in the past. Also, the mafioso was supported by the police because he promised to do documents for the respondent. The respondent saw the mafia person a second time a few days later before the 26th of October. At the second meeting the respondent was threatened again that if he did not sign the papers to sell the flat, that people would kill the respondent. The respondent left and he did not sign the paper. The flat remains empty, the keys are with friends and the respondent sends money to This friend or friends to pay the rent. Respondent, through counsel, points out that Exhibit 9, the Department of State Country Report on Human Rights Practices for

the Ukraine, year 2000, indicates that corruption is pervasive in Ukraine and there are connections between government officials and organized crime and the political activities of organized crime figures often blur the distinction between political and criminal acts. Politicians, politically connected businessmen and journalists have been the victims of possibly politically motivated and sometimes fatal acts. The Court does not doubt that there is corruption and that there are connections between government officials and organized crime. However, the Court does not believe that the respondent has provided a clear explanation for how the mafia person in this particular case knew that respondent had troubles with the police or that this person in fact was working with the police. The Court is not saying that it is not possible, but the Court does not believe that it has been clearly delineated in terms of this individual truly being a mafioso other than by his slang or that this particular mafioso had connections with the police in the respondent's district and knew what had happened to the respondent.

Respondent testified then that he received a summons in the mail at the end of October 1999, about the 26th of October. At this point the Court recessed for lunch and then we convened at 1:35 p.m. The respondent, through counsel, provided a

brief summary of his arrest and the events, following thereafter with the dates of each of these events. Respondent was arrested and given his first summons October 5, 1999, the police came to his apartment and left a summons October 12, 1999, the first meeting with the mafioso, October 15, 1999, the second meeting with the mafioso, October 22, 1999 and the receipt of the summons in the mail which was found by a neighbor who opened the respondent's mailbox October 26, 1999. Respondent was asked on cross examination if he could produce any of the summons. Respondent testified that he destroyed certain of these summons as he had already testified at least as to the first summons, and that some summons are with the neighbor and although these summons were requested by someone on behalf of respondent, the neighbor did not comply and did not send the summons.

Respondent testified that he was hiding, living with a friend after October 26, 1999, that he did not return to the apartment and he stayed with a friend until he left Kiev in September of 2000. However, Exhibit 6, tab 36 indicates that the passport document issued July 23, 2000 was apparently picked up by the respondent at the management office of the building where he had lived. The respondent, when asked to explain, said that he had his friends check out the

apartment and they apparently told him that it was safe for him to go there and pick up the summons. Respondent testified further that he is fearful of the threats of the mafioso.

Respondent testified as well that he went then to live in Lithuania in Vilnius for one month, that he had been there before and asked for permanent residence in 1994. The Court can only presume that such was rejected.

Respondent returned to Kiev before January 1, 2000. In December 1999, wanting to process his papers to leave the Ukraine, respondent bought an external passport from a friend and left the Ukraine September 2000, having obtained a visa to Mexico.

The respondent fears return to the Ukraine. He believes he will be threatened with arrest, he fears beating by the police, he fears long detention by the police after arrest and he fears that his life will be in danger by the mafia.

Respondent contends that the police are still looking for him and this information comes to him from his friends through letters. There are several letters in the record from respondent's friends issuing various warnings. These

apparently are the friends who asked the neighbor to provide the summons or perhaps even visited the neighbor to ask the neighbor to provide the summons, but there is really no explanation why these summons were not provided. Several letters were sent by the friends. The summons could have been included. There is no testimony as to why the neighbor did not turn over the summons to the friends solely that the neighbor was asked to send the summons, but that the neighbor did not. The respondent also testified that the police are still visiting the building where he lived according to the letters of the friends.

As to relocation, the respondent testified that is not possible, that he would be recognized by his language and by his name and also he would need to apply for a propiska in another part of the Ukraine and by doing so he could very well be found out.

Certain statements were read to the respondent from Exhibit 9, the United Stages Department, of State Country Report, page 17 of 21, paragraph 3, under "Minorities." The respondent stated that he believes the report is untrue. And as to the statement from the Profile, Exhibit 10, page 4, concerning President Kuchma's ease in the Russian language, the

respondent also doubts the veracity of that statement. Respondent's counsel has indicated the appearance of documents in the record that support the respondent's claim of even taking place in the Ukraine. Whether those documents specifically negate the report or relate for the most part to nationalism in the Ukraine, the Court cannot be certain. The court itself ahs seen documents relating to the Ukraine, but primarily to the issue of nationalism, not necessarily relating to the issues raised by the Government in Exhibits 9 and 10. This concludes all testimony in this matter.

In all applications for asylum, withholding of removal and relief under the Convention Against Torture, the Court must make a threshold determination of credibility. An Immigration Judge's findings of credibility of witnesses appearing before her are ordinarily given great weight. Matter of Pula, 19 I&N Dec. 467 (BIA 1982). Indications of credible testimony are consistency in direct and cross, consistency with the written application and the absence of embellishment as the applicant repeatedly tells his story. Matter of B-, Int. Dec. 3251 (BIA 1995). Testimony is considered not credible when it is inconsistent, contradictory of current country conditions or inherently improbable. Matter of S-M-J-, Int. Dec. 3303 (BIA 1997).

The Court has already raised certain internal inconsistencies in the respondent's testimony and omissions from the declaration of certain statements made in testimony central to the respondent's claim, particularly with regard to his university group, his part in the group in terms of his duties and obligations to the group, also the lack of any statements concerning medical treatment, although there are medical documents. The Court will not reiterate statements already made only to point out that based on the inconsistencies and the omissions, the Court must at least in part, make an adverse credibility finding. Also, the Court does not understand, which could be an important issue in this case, the inconsistency between the respondent's statement concerning his five years spent in Poland and the lack of that information in his application, as well as his statement of having a diploma received after attendance at the technical institute initially in the early 1990's and later in 1997, 1998 and 1999, which the latter years do not appear in the student record.

As to the issue of past persecution, the Court believes that based on its credibility finding there is insufficient evidence to show that the respondent has suffered persecution or has a well-founded fear of persecution within the

meaning of Section 208 INA. Assuming for the sake of argument that the respondent's testimony is true, as to his relationship with the police, even assuming that he was injured as he explained, that his nose was broken and he received a concussion, on the one hand the Court recognizes that the police behavior did not allow the respondent and his group to pursue freedom of speech speaking against the government. On the other hand, the police ordered the people to disperse. They did not. The police may have used excessive force in bringing the crowd to a state that they desired, but the Court cannot say for certain what the motivation was. As to the treatment at the police station and the numerous summons, although there is significant documentation in the file, none of these summons or a police report showing the arrest has been filed with this Court. Furthermore, the Court does not know if a single episode without some corroborative documentation because of the credibility finding, particularly with regard to the summons, would support a finding of past persecution. As to a well-founded fear of future persecution, the Court does not doubt that there is certainly discrimination against Russian speakers in the Ukraine although the Department of State report, Exhibit 9, indicates that there are laws now providing opportunities for Russian speakers, including Russian schools. The

respondent no doubt did face discrimination with regard to his Russian speaking and to the recognition of his name, however, the Court does not believe that that would be sufficient to show a well-founded fear of actual persecution. As to the issue of withholding of removal, the respondent has not met his burden of proof for a grant of asylum and he cannot meet the more stringent standard of Section 241(b)(3) INA for withholding of removal.

As to the Article III of the Convention Against Torture, taking into account the fact, even assuming that all of these summons in fact were served upon the respondent and that should he return to the Ukraine, that he would be arrested by the police, the Court does not believe that there is necessarily support to show that the respondent while in jail would be tortured. The injuries that respondent suffered came to him at the demonstration. He does not appear to have been physically harmed while he was held in jail for the particular day. Therefore, the Court would not be able to find that it is more likely than not that upon return to the Ukraine that respondent will suffer torture at the hands of the police or other government officials.

As to the mafioso, here it appears to the Court that the mafioso wanted the respondent's

flat, offered him a certain sum of money, threatened the respondent if he did not sign the papers for the flat. The Court does not particularly see this event as falling within any of the protected areas under Section 101(a)(42)(A) of the Act and the Court does not believe there is sufficient evidence to show the connection of this particular mafia member, assuming that he was a mafia member, with the police in conjunction with the police and acting against the respondent on that basis.

The respondent is not eligible for voluntary departure. That has already been discussed as he does not meet the requirements under Section 240B(b)(1)(A).

Accordingly, in light of all of the testimonial and documentary evidence of record, the following orders will be entered:

ORDER

IT IS ORDERED that respondent is removable from the United States pursuant to Section 212(a)(6)(C)(ii) INA and Section 212(a)(7)(A)(i)(I) INA.

IT IS FURTHER ORDERED that respondent's application for asylum under

Section 208 INA and for withholding of removal under Section 241(b)(3) INA is denied.

IT IS FURTHER ORDERED that respondent's application for relief under Article III of the CAT is denied.

IT IS FURTHER ORDERED that respondent be removed from the United States to Ukraine on the charge set forth in the Notice to Appear.

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DARLENE R. SELIGMAN,
Immigration Judge